

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARVIN’S BAGEL CAFÉ, INC.</b>	:	ORDER
	:	DTA NO. 818021
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period September 1, 1992 through	:	
August 31, 1997.	:	

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Petitioner, Marvin’s Bagel Café, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1992 through August 31, 1997.

A hearing was scheduled before Presiding Officer Arthur Johnson at the offices of the Division of Tax Appeals, Nassau District Office, 175 Fulton Avenue, Hempstead, New York on May 24, 2001 at 1:15 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request that the default determination be vacated.

Petitioner appeared by Dennis A. Adelman. The Division of Taxation (“the Division”) appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Upon a review of the evidence and arguments presented Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. On September 18, 2000, the Division of Tax Appeals received a petition from Marvin’s Bagel Café, Inc. protesting a conciliation order issued by the Bureau of Conciliation and

Mediation Services which sustained a Notice of Determination of New York State sales and use tax for the period September 1, 1992 through August 31, 1997.

2. On April 18, 2001, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Division of Taxation advising them that a hearing had been scheduled for Thursday, May 24, 2001 at 1:15 P.M. in the Nassau District Office at 175 Fulton Avenue, Hempstead, New York 11550-3797.

3. On May 6, 2001, Dennis A. Adelman wrote to the Calendar Clerk of the Division of Tax Appeals to request an adjournment of the hearing scheduled for May 24, 2001. Mr. Adelman had been previously advised by the Division of Tax Appeals, in a letter dated November 30, 2000, that he did not qualify as a representative under the Rules of Practice and Procedure of the Tax Appeals Tribunal and, therefore, would not be allowed to represent petitioner unless he received special permission to do so from the Tax Appeals Tribunal. Although he had over five months to seek special permission from the Tax Appeals Tribunal before the hearing, Mr. Adelman never did so. By letter dated May 9, 2001, the Calendar Clerk of the Division of Tax Appeals advised petitioner that Mr. Adelman's request for adjournment could not be considered because Mr. Adelman was not an authorized representative. Petitioner was once again advised to seek special permission from the Tax Appeals Tribunal. Neither petitioner nor Mr. Adelman responded in any way to this advice.

4. On May 24, 2001, at 1:15 P.M., Presiding Officer Arthur Johnson commenced a hearing in the *Matter of Marvin's Bagel Café, Inc.* Petitioner did not appear at the hearing and a default was duly noted.

5. On June 28, 2001, Presiding Officer Johnson issued a default determination against petitioner.

6. On February 5, 2002, Mr. Adelman filed an application to vacate the default determination. Simultaneously, he also submitted a request for special permission from the Tax Appeals Tribunal to represent petitioner. On February 11, 2002, Robert P. Rivers, Secretary to the Tax Appeals Tribunal, advised Mr. Adelman that the Tribunal had granted his request to represent petitioner.

7. In his request to vacate the default, Mr. Adelman asserts that due to a breakdown in communications, no one ever responded to the Calendar Clerk's letter of May 9, 2001, each believing that the other would respond. Mr. Adelman's request does not address the merits of petitioner's case.

8. The Division of Taxation by its letter of March 4, 2002 opposed petitioner's request to vacate the default and pointed out that petitioner had shown neither reasonable cause for its failure to appear at the hearing nor the existence of a meritorious case.

### ***CONCLUSIONS OF LAW***

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.13[d][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see*,

*Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that it had a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner has not established a valid excuse for its failure to appear at the hearing. Even if we accept Mr. Adelman's excuse that there was a mix-up in making the request for an adjournment, it must be noted that when they did not receive a response to the request that they thought had been submitted, neither Mr. Adelman nor petitioner contacted the Division of Tax Appeals to find out if the request for adjournment had been granted. Apparently, they just assumed that any request would be automatically granted. Moreover, Mr. Adelman and petitioner failed to contact the Division of Tax Appeals when the default determination was issued. Surely by this point they must have become aware that the adjournment had not been granted and that they had been found in default. It was not until February 5, 2002, some eight months after the default determination was issued, that Mr. Adelman first contacted the Division of Tax Appeals regarding the default determination. I do not consider that petitioner has acted in a reasonable manner and I must conclude that petitioner has not established reasonable cause for its failure to appear at its hearing. Petitioner has failed to meet the first criterion to have the default order vacated.

D. Petitioner has also failed to establish a meritorious case. In fact, petitioner has made no showing whatsoever regarding the merits of its case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued June 28, 2001 is sustained.

DATED: Troy, New York  
April 11, 2002

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE